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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JUDITH A. FELTMANN,

Petitioner,

v.

SIEBEN, INC., d/b/a PLAZA MOTORS,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In order to withstand an employer's motion for summary judgment or judgment as a matter of law in a discrimination action, must a plaintiff only establish a prima facie case of discrimination along with pretext, as held by the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits; establish a prima facie case along with pretext and proof that discrimination was the real reason for the employer's actions, as held by the First, Second, Fourth and Fifth Circuits; or must plaintiff provide direct evidence of discrimination, as held by the Eighth Circuit?

2. Whether the Eighth Circuit Court of Appeals erred by misapplying the standard of review, whereby the court should not reverse a jury verdict unless there is a complete absence of probative facts to support the conclusion reached, when it reversed the jury's verdict on all five counts?

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PETITION FOR WRIT OF CERTIORARI

Judith A. Feltmann respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 20, 1997, in order to resolve the conflict within the circuits on the important issue presented herein and to reverse the judgment below.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Eighth Circuit is reported as *Feltmann v. Sieben, Inc.*, 108 F.3d 970 (8th Cir. 1997), and is attached hereto as Appendix A to this Petition. Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on June 18, 1997; however, three judges voted to rehear the matter *en banc*. The order denying the petition for rehearing is not officially reported and is attached hereto as Appendix B.

The district court's opinion in *Feltmann v. Sieben, Inc.*, No. 4:94CV562 SNL (E.D. Mo.), was filed April 12, 1995 and is not officially reported. That opinion is attached hereto as Appendix C. The district court's opinion pertaining to post-trial matters was filed on November 16, 1995 and is not officially reported. That opinion is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 20, 1997. (*See* Appendix A). On June 18, 1997, the court of appeals denied a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*See* Appendix B). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. §2000e-2 provides:

> (a) Employer Practices. It shall be an unlawful employment practice for an employer:
>
> (1) [T]o . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. §2000e-3 provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against his employees . . . because he has opposed any practice made an unlawful practice . . . .

Mo.Rev.Stat. §213.055 provides:

> 1. It shall be unlawful employment practice:
>
> (1) For an employer, because of the . . . sex . . . of any individual:
>
> (a) To . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

Mo.Rev.Stat. §213.070 provides:

> It shall be an unlawful discriminatory practice:
>
> (2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter . . . .

STATEMENT OF THE CASE

Petitioner, Judith A. Feltmann ("Feltmann"), was discharged from her position as a commissioned car sales consultant with respondent, Sieben, Inc. ("Sieben"),

which is a Missouri corporation that operates a number of automobile franchises under the name "Plaza Motor Company." Feltmann filed suit in the United States District Court, Eastern District of Missouri, claiming that she was discharged in violation of Title VII, 42 U.S.C. §2000e *et seq.*, the Missouri Human Rights Act, Mo.Rev.Stat. §213.010 *et seq.*, and the Missouri common law. The United States District Court had jurisdiction to hear this matter pursuant to 28 U.S.C. §1331.

Feltmann submitted five claims to the jury: 1) sex discrimination in violation of Title VII, 2) retaliation in violation of Title VII, 3) sex discrimination in violation of Mo.Rev.Stat. §213.010 *et seq.*, 4) retaliation in violation of Mo.Rev.Stat. §213.010 *et seq.*, and 5) wrongful discharge. On May 16, 1995, a jury found in favor of Feltmann on all five counts and awarded Feltmann the sum of $112,661.00 for back pay, $20,072.29 for compensatory damages, and $25,000.00 in punitive damages on her Title VII sex discrimination claim. (*See* Appendix C).

On May 26, 1995, Sieben filed a timely Motion for Judgment as a Matter of Law, or in the alternative, Motion for a New Trial, or in the alternative, to Alter or Amend the Judgment. On November 16, 1995, after a hearing on the equitable issues, the district court denied all of Sieben's motions and awarded Feltmann front pay for a two year period in the total amount of $72,668.38, attorney's fees of $153,338.45, and costs of $14,251.87. (*See* Appendix D).

On November 22, 1995, Sieben filed a timely Notice of Appeal. On March 20, 1997, the United States Court of Appeals for the Eighth Circuit issued its opinion, reversing all five jury verdicts in favor of Feltmann. (*See* Appendix A). On June 18, 1997, the court of appeals denied plaintiff's timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*See* Appendix B).

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS WITHIN THE CIRCUITS AS TO WHETHER THE ESTABLISHMENT OF A PRIMA FACIE CASE OF DISCRIMINATION ALONG WITH PRETEXT IS ENOUGH FOR A PLAINTIFF IN A DISCRIMINATION ACTION TO OVERCOME DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR JUDGMENT AS A MATTER OF LAW. THIS CASE, WHEREBY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REVERSED THE JURY'S VERDICT ON ALL FIVE COUNTS AND REQUIRED PLAINTIFF TO PROVIDE DIRECT EVIDENCE OF DISCRIMINATION TO OVERCOME SUCH A MOTION, PRESENTS AN APPROPRIATE CASE FOR RESOLVING THAT QUESTION.

Although the United States Supreme Court decided that plaintiff's establishment of a prima facie discrimination case plus proof of pretext is not enough to award plaintiff summary judgment or judgment as a matter of law, *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993), the Court has not stated whether proof of a prima facie case along with pretext is enough for plaintiff to overcome an employer's motion for summary judgment or judgment as a matter of law. The circuit courts have been asked repeatedly to decide this issue and turmoil exists among the circuits as to how it should be resolved.

A. Direct Evidence Approach.

In the case at hand, the Eighth Circuit relied on the holding in *Nelson v. J.C. Penney Inc.*, 75 F.3d 343 (8th Cir. 1996), in granting defendant's motions for judgment as a matter of law on all five counts of the complaint, thereby requiring Feltmann to provide direct

evidence of discrimination. (*See* Appendix A, p. 8a). The court mistakenly required the plaintiff to provide direct evidence of discrimination in order to overcome a motion for judgment as a matter of law in a *McDonnell Douglas* disparate treatment case. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). Case law clearly acknowledges that, due to the difficulty in discovering direct evidence of discrimination, a plaintiff may rely on direct or circumstantial evidence in establishing a disparate treatment discrimination cause of action. *See St. Mary's v. Hicks,* 509 U.S. at 524; *See also Ryther v. Kare 11,* 108 F.3d 832, 838 (8th Cir. 1997); *Rothmeier v. Investment Advisers, Inc.,* 85 F.3d 1328, 1331 (8th Cir. 1996). Moreover, the Supreme Court has stated, "the *McDonnell Douglas* formula does not require direct proof of discrimination." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 n.44, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). By requiring direct evidence of discrimination in the case at hand, the Eighth Circuit is clearly taking away the jury's function of determining the ultimate factual issue pertaining to intentional discrimination.

In concluding that Feltmann needed to establish direct evidence of discrimination, the Eighth Circuit also relied on *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). However, the court misapplied *Lowe* because, in that case the court specifically stated, "[i]n general, a plaintiff may rebut a defendant's asserted justification either directly, or indirectly, by showing that the proffered explanation is unworthy of belief." *Id.*

In his concurring opinion of the denial of the Motion for Rehearing in *Nelson v. J.C. Penney Inc.*, 79 F.3d 84 (8th Cir. 1996), Judge McMillian discussed the confusion within the Eighth Circuit regarding the standard for

granting the employer in a Title VII action summary judgment or judgment as a matter of law. *Nelson v. J.C. Penney,* 79 F.3d at 85 (McMillian, J., concurring). The majority opinion in that case required the plaintiff to provide direct evidence of discrimination in order to overcome defendant's motion for summary judgment. *Nelson v. J.C. Penney Co.,* 75 F.3d 343, 345 (8th Cir. 1996). Judge McMillian pointed out that, though plaintiff's evidence was insufficient to overcome a motion for summary judgment, the majority opinion mistakenly required direct evidence of discrimination, which is the standard applied to reduction-in-force and mixed-motive discrimination cases, not *McDonnell Douglas* disparate treatment cases. *Nelson v. J.C. Penney,* 79 F.3d at 85 (McMillian J., concurring). In his concurrence, Judge McMillian stated that the majority opinion relied on *Nelson v. Boatmen's Bancshares, Inc.,* 26 F.3d 796 (8th Cir. 1994), a reduction-in-force case, in reaching its decision. *See* Judge McMillian's concurrence, *Nelson v. J.C. Penney,* 79 F.3d at 85. Thus, the court wrongfully applied the standard for a reduction-in-force discrimination case, which requires direct proof of discrimination, to a disparate treatment discrimination case, which can be established through direct or circumstantial evidence. *Id.*

Approximately six months after the holding in *Nelson v. J.C. Penney,* 75 F.3d 343 (8th Cir. 1996), wherein the Eighth Circuit required the plaintiff to provide direct evidence of discrimination in a *McDonnell Douglas* burden-shifting analysis case, the court contradicted itself and stated that a plaintiff may rely on either direct or circumstantial evidence to prove unlawful discrimination in such a case. *Rothmeier,* 85 F.3d at 1331. Even more recently, in the case at hand, the court ignored its holding in *Rothmeier* and again wrongfully required direct

evidence of discrimination in a *McDonnell Douglas* sex discrimination case. (*See* Appendix A, p. 8a). Thus, it is clearly evident that there is serious confusion within the Eighth Circuit as to whether the plaintiff in a *McDonnell Douglas* discrimination case must provide direct evidence of intentional discrimination in order to overcome defendant's motion for summary judgment or judgment as a matter of law.

Furthermore, the Eighth Circuit interpreted the United States Supreme Court's holding in *Hicks* to reject the pretext-only and pretext-plus approaches, discussed below, in exchange for a middle ground approach whereby the test is simply whether the plaintiff provided sufficient evidence for a reasonable factfinder to conclude that the employer intentionally discriminated against the employee. *Rothmeier,* 85 F.3d at 1334. In *Rothmeier,* the court acknowledged that its holdings regarding the requirements for a plaintiff to overcome a defendant's motion for summary judgment have not been consistent since the Supreme Court's ruling in *Hicks. Id.* at 1335. The court has held on occasion that establishment of a prima facie case along with evidence of pretext was enough to survive a defendant's motion for summary judgment while at other times the court held that the plaintiff needed to provide additional facts to establish that the employer's rationale for its actions was pretextual and the real reason for the employer's behavior was intentional discrimination. *Id.* at 1336. In *Rothmeier,* the court explained this discrepancy by interpreting *Hicks* to adopt a case-by-case, fact specific approach and stated that this is the approach taken by the Eighth Circuit. *Id.* Thus, the Eighth Circuit adopted the rule that, in order to avoid an employer's motion for summary judgment or judgment as a matter of law, the plaintiff must:

> (1) create[ ] a fact issue as to whether the employer's proffered reasons are pretextual and (2) create[ ] a reasonable inference that . . . [discrimination] was a determinative factor in the adverse employment decision.

Id. at 1336-37.

According to the court, the second prong of this test can sometimes be met without the requirement of any evidence beyond that already provided under the first prong, if the evidence proved during the prima facie case and proof of pretext is strong enough to indicate that intentional discrimination was the employer's motivating factor. *Id.* at 1337. *See also Ryther v. Kare 11,* 108 F.3d 832 (8th Cir. 1997).

In sum, it is clear from the case law that the Eighth Circuit has been inconsistent in determining what amount and kind of evidence the plaintiff must prove in a *McDonnell Douglas* discrimination case to overcome an employer's motion for summary judgment or judgment as a matter of law. Although the Eighth Circuit is the only circuit to require direct evidence of discrimination, an analysis of case law in the remaining circuits indicates that confusion and conflict exist between the circuits as to what the plaintiff is required to prove in a disparate treatment case. As seen in Part II of this section of this Petition for Writ of Certoirari, which is adopted and incorporated by reference, the Eighth Circuit demonstrates its confusion in determining what standard to apply in a *Hicks* case because, in the case at hand, it required the plaintiff not only to establish pretext, but to show discrimination through direct evidence.

B. Pretext-Only Approach.

The majority of circuits conclude that plaintiff's establishment of a prima facie case along with pretext is enough to overcome an employer's motion for summary judgment or judgment as a matter of law.

In following this "pretext-only" approach, the Third Circuit has interpreted *Hicks* to mean that:

> [T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1066-67 (3rd Cir. 1996).

Thus, the court in *Sheridan* determined that:

> It followed [from Hicks] that a plaintiff may survive summary judgment (or . . . judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.

Id. at 1067.

Accord Bray v. Marriott Hotels, 110 F.3d 986 (3rd Cir. 1997); *Fuentes v. Perskie*, 32 F.3d 759 (3rd Cir. 1994).

The Sixth Circuit has similarly held that, if a plaintiff in a Title VII action proves a prima facie case, the plaintiff will survive the employer's motion for summary judgment or judgment as a matter of law. *Equal Employment Opportunity Comm'n v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997). The Sixth Circuit stated that this conclusion naturally followed since plaintiff's establishment of a prima facie case creates a rebuttable pre-

sumption that the employer must overcome by proving that its actions were for a legitimate, nondiscriminatory reason. *Id.* In *Equal Employment Opportunity Comm'n v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997), the Sixth Circuit interpreted *Hicks* to reject the "pretext-plus" approach since *Hicks* stated that a plaintiff can establish intentional discrimination by proving a prima facie case along with pretext, without having to provide any additional evidence. *Yenkin-Majestic*, 112 F.3d at 835.

In following the pretext-only approach, the Seventh Circuit stated that the plaintiff in a Title VII discrimination case must only " 'provide evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal" in order to overcome a defendant's motion for summary judgment. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990)). In *Anderson*, the Seventh Circuit noted the two different approaches being followed by the circuits, but interpreted *Hicks* to apply this pretext-only approach. *Anderson* at 1122-23. *See also Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332 (7th Cir. 1991). The Seventh Circuit has also held that, where the employer provides more than one rationale for its actions, plaintiff does not necessarily have to prove that each explanation is pretextual in order to overcome defendant's motion for summary judgment. *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 920 (7th Cir. 1996). Instead, where defendant's explanations are intertwined or one explanation is rather suspicious in nature, the plaintiff is not required to prove that each of the employer's explanations is pretextual in order to survive defendant's motion for summary judgment. *Id.*

The Ninth Circuit applies a stringent standard in considering summary judgment motions in employment discrimination cases " 'because the ultimate question is one that can only be resolved through a "searching inquiry" – one that is most appropriately conducted by the fact-finder.' " *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (quoting *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))). Though the Ninth Circuit states that establishment of a prima facie case is not enough by itself to avoid a motion for summary judgment, it does provide that "a plaintiff need produce 'very little evidence of discriminatory motive to raise a genuine issue of fact' as to pretext." *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 870 (9th Cir. 1996), citing *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (quoting *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991)). According to the Ninth Circuit, the plaintiff will almost always survive an employer's motion for summary judgment in a Title VII action if the plaintiff provides some evidence, whether direct or circumstantial, beyond the presumption established by the prima facie case. *Id.* (quoting *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))). Also, the same evidence used to prove the prima facie case can also establish pretext. *Id.*

The Tenth Circuit has also held that plaintiff's proof of a prima facie case of discrimination plus evidence of pretext means that the case should go before the trier of fact. *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997) (citing *Jones v. Unisys Corp.*, 54 F.3d

624, 630 (10th Cir. 1995)). Furthermore, the Tenth Circuit has stated that the plaintiff does not have to prove that discriminatory reasons motivated the employer's actions in order to overcome the employer's motion for summary judgment. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1321 (10th Cir. 1997) (citing *Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995)). Instead, illustrating pretext is enough for plaintiff to survive defendant's motion for summary judgment. *Id.* at 1323 (citing *Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995) (quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 n.3 (10th Cir. 1994))). Any doubts regarding pretext must be resolved in plaintiff's favor when analyzing a defendant's motion for summary judgment. *Id.* at 1324.

Like the majority of other circuits, the Eleventh Circuit concluded that establishment of a prima facie case plus evidence of pretext is enough for a plaintiff to overcome a defendant's motion for summary judgment in a Title VII discrimination action. If plaintiff provides enough evidence to illustrate that a genuine issue exists as to whether defendant's explanation for its actions is true, then plaintiff must survive defendant's summary judgment action. *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). *Accord Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997). Similarly, a defendant is not entitled to judgment as a matter of law if plaintiff demonstrates that an issue exists as to whether or not defendant's rationale is the true reason for its decision. *Combs*, 106 F.3d at 1538.

In following the pretext-only approach, the District of Columbia Circuit stated that the holding in *Hicks* requires a court to deny an employer's motion for summary judgment or judgment as a matter of law if plain-

tiff raises a genuine issue of fact as to whether or not defendant's proffered reasons for its actions are the truth. *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997). *See also Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997).

C. Pretext-Plus Approach.

A minority of the circuits require that, along with the establishment of a prima facie case of discrimination and proof that the employer's reasons given for its actions are unworthy of credence, the plaintiff must also prove that intentional discrimination was the real reason for the employer's actions in order to overcome an employer's motion for summary judgment or judgment as a matter of law.

According the the First Circuit:

> the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on . . . [discrimination].

Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994) (citing *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1117 (1st Cir. 1993) (additional citations omitted)).

Accord Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996). Thus, a plaintiff must prove more than the falsity of the employer's proffered reasons. *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991). The plaintiff must:

> "elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: . . . discrimination."

Id. (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990)).

Following this same approach, the Second Circuit has stated that, in order to survive an employer's motion for summary judgment, a plaintiff in a Title VII discrimination action must provide sufficient evidence that the employer's proffered reasons for its actions are false and that discrimination is more likely than not the real reason for its actions. *Scaria v. Rubin*, 117 F.3d 652, 654 (2nd Cir. 1997). The plaintiff need not establish that discrimination was the only reason for the employer's actions, but instead must show, by a preponderance of the evidence, that it was a determinative factor. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502 (2nd Cir. 1994) (citing *Levin v. Analysis & Technology, Inc.*, 960 F.2d 314, 317 (2nd Cir. 1992)). *Accord Holt v. KMI-Continental, Inc.*, 95 F.3d 123 (2nd Cir. 1996).

The Court of Appeals for the Fourth Circuit has held that a plaintiff in a Title VII action must provide either direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996) (quoting *Equal Employment Opportunity Comm'n v. Clay Printing*, 953 F.2d 936, 941 (4th Cir. 1992) (quoting *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988))). To establish pretext, the Fourth Circuit stated that the plaintiff must only prove that discrimination was more likely the reason for the employer's actions than the explanation given by the employer. *Tuck v. Henkel Corp.*, 973 F.2d 371, 375 (4th Cir. 1992). *See also Mitchell v. Data Gen. Corp.*, 12 F.3d 1310 (4th Cir. 1993).

The Fifth Circuit also requires that the evidence be sufficient to establish that the employer intentionally discriminated against the plaintiff in order for the plaintiff to overcome defendant's motion for summary judgment or judgment as a matter of law. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 995 (5th Cir. 1996). The plaintiff must create a fact issue as to whether or not the employer's proffered reasons for its actions are the true explanation and must create a reasonable inference that discrimination was a determinative factor in the employer's actions. *Id.* at 994. *See also Equal Employment Opportunity Comm'n v. Texas Instruments, Inc.*, 100 F.3d 1173 (5th Cir. 1996); *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137 (5th Cir. 1996).

D. Summary.

It is clear from the case law that serious confusion and discrepancy exists among the circuits, and within the Eighth Circuit, regarding the evidence required of a plaintiff in a Title VII discrimination action in order for the plaintiff to survive an employer's motion for summary judgment or judgment as a matter of law. Consequently, writ of certiorari is necessary to end this confusion and to establish a consistent standard for reviewing a defendant's motion for summary judgment or judgment as a matter of law in a Title VII action, in order to ensure that Title VII is properly applied and uniformly enforced throughout the courts.

II.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED WHEN IT REVERSED THE DISTRICT COURT'S JUDGMENT ON ALL FIVE COUNTS BECAUSE IT MISSTATED THE STANDARD FOR REVIEWING A DISTRICT COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW, NEGLECTED TO ASSUME AS PROVEN ALL FACTS THAT PLAINTIFF'S EVIDENCE TENDED TO PROVE, DID NOT RESOLVE CONFLICTS IN FAVOR OF THE NON-MOVING PARTY, AND DID NOT GIVE THE NON-MOVING PARTY THE BENEFIT OF ALL REASONABLE INFERENCES.

The Eighth Circuit Court of Appeals did not follow the appropriate standard of review when it reversed the jury's verdict. A court should only reverse a jury's verdict "when there is a complete absence of probative facts to support the conclusion reached." *Ryther,* 108 F.3d at 845. In completely overturning the district court's judgment, the Eighth Circuit did not correctly state the standard of review and blatantly ignored the standard it enunciated. The Court made the following statement regarding the standard of review:

> We review de novo a district court's denial of a motion for judgment as a matter of law, applying the same standard used by that court. *See Trition Corp. v. Hardrives, Inc.,* 85 F.3d 343, 345 (8th Cir. 1996). We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for judgment as a matter of law if reasonable persons could differ regarding the conclusions to be drawn from that evidence. See e.g. *Ryther v. KARE 11,* 108 F.3d 832, 1997 U.S. App. LEXIS 3897, No. 94-3622, *slip op.* at 25-26 (8th Cir. Mar 6, 1997) (*en banc*); *Kientzy v. McDonnell*

Douglas Corp., 990 F.2d 1051, 1056 (8th Cir. 1993).

See Appendix A, p. 7a.

However, in addition to the considerations stated above, the court must also assume as proven all facts that plaintiff's evidence tended to prove. *Ryther,* 108 F.3d at 844. The court of appeals must review all facts, assuming all facts in the nonmoving party's favor are true which the evidence tends to prove, resolving any conflicts in favor of the non-moving party, and giving the non-moving party benefit of all reasonable inferences. *James E. Brady & Co., Inc. v. ENO,* 992 F.2d 864, 869 (8th Cir. 1993). *See also Celotex Corp. v. Catrett,* 477 U.S. 316, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). By reversing the jury verdict in *Feltmann,* the court of appeals clearly did not follow this standard because substantial evidence was proven to show that Sieben intentionally discriminated against plaintiff. The jury's verdict for Feltmann on all five counts is indicative of the strength of Feltmann's evidence.

In this case, the Eighth Circuit isolated each piece of evidence establishing discrimination, and determined that individual pieces of evidence, standing alone, did not support a finding of discrimination instead of looking at the cumulative evidence as a whole. In reviewing this case on appeal, the court should be concerned with "whether the overall evidence supports a reasonable inference" that sex motivated Sieben's termination of Feltmann. *Ryther,* 108 F.3d at 840 (citing *Hicks,* 509 U.S. at 511). Even though no one factor may be determinative, the court must look at the cumulative effect of the evidence. *Craik v. Minnesota State Univ. Bd.,* 731 F.2d 465, 483 (8th Cir. 1984). Thus, the

Eighth Circuit failed to review the record as a whole in determining whether discrimination existed.

After completely emasculating the evidence proved by Feltmann, the Eighth Circuit re-evaluated the unrefuted evidence, and discounted Feltmann's own testimony in multiple areas as being "vague and conclusory claims" that were insufficient to support a claim of disparate treatment, citing *Lidge-Myrtil,* 49 F.3d 1308, 1311-12 (8th Cir. 1995), and *Davenport v. Riverview Gardens Sch. Dist.,* 30 F.3d 940, 945 (8th Cir. 1994). However, the Eighth Circuit erred in relying on *Lidge-Myrtil* because that case involved the grant of a summary judgment motion where the plaintiff attempted to introduce the hearsay statement of an unidentified person for the first time in her appellate brief. In addition, the court in *Davenport,* another case reviewing the granting of summary judgment, stated:

> [I]n light of plaintiff's *failure to adduce any independent evidence* to substantiate his disparate treatment claim, we agree with the district court that there is no genuine issue of fact on the issue of pretext and the ultimate issue of intentional discrimination.

Davenport, 30 F.3d at 945 (emphasis added).

The cases of *Lidge-Myrtil* and *Davenport* are inapposite because Feltmann did produce specific examples of discrimination, which was not done in either of those cases. If the evidence presented at trial is reviewed in accordance with *Ryther* and *Hicks,* the evidence not only is sufficient to permit an inference of intentional discrimination, but it also clearly supports the jury's finding of discrimination. It is essential that

the evidence at trial be reviewed as a whole to determine if it supports a reasonable inference of discrimination. The evidence at trial was as follows:

A. Background.

Sieben, Inc. operates an automobile dealership in St. Louis County, known as "Plaza Motor Company," with separate automobile franchises, including Infiniti (T. 5:12 and 78).[1] Feltmann was hired by Bob Rich, the former sales manager at Plaza Infiniti, in September 1991 as a full time sales consultant of Infiniti automobiles. (T. 3:58-59). Feltmann was the first female Rich hired since 1982. (T. 2:54). The other sales consultants at Plaza Infiniti in September of 1991 were all males, Rick Buetel, Casey Jones, Stuart Ziglin, Mike Barnstead, and Scott Brenner. (T. 3:60).

B. Initial Complaint Of Discrimination.

In November 1992, Feltmann learned from her co-worker, Barnstead, that another employee of Plaza Motors who worked in a different franchise, Gordon Anzalone, allegedly called Feltmann a "f - - - - - - c - - -." (T. 3:92-93). Anzalone was talked to by management, and Feltmann was told that if Anzalone made any similar comments, she should report it. (T. 3:97-98).

C. Work Ethic Memorandum Given Only To Feltmann.

On January 4, 1993, Rich sent Feltmann a memo concerning her "work ethic." (T. 3:121). From when

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[1]The notation "T. 5:12 and 78" denotes pages 12 and 78 of Volume Five of the Trial Transcript.

Feltmann started at Plaza Infiniti in September 1991 through November 1992, she received no criticisms of her method of selling automobiles. (T. 3:83). Before making her complaint of discrimination, Feltmann was complimented on numerous occasions by Rich, Tony Pandjiris (the general manager), and John Capps (the president) as well as customers, for having done a good job and having high Customer Satisfaction Index ("CSI") scores, including the highest at Plaza Infiniti. (T. 3:77-70, 83, 90-91, 121-122; 6:3-4). Also, Feltmann was recognized as a top Infiniti sales consultant in the United States. (T. 3:90, 150). She was even named to the Infiniti Pinnacle Club, an elite national recognition program for high achievement in sales and customer satisfaction. (T. 3:148). None of the other male sales consultants received such a memo (T. 2:79-80), even though Feltmann ranked above half of the male sales consultants at Plaza Infiniti in terms of the number of new and used cars sold for the entire year of 1992 and had the highest sales in December 1992. (T. 3:120-122).

A few days prior to receiving the January 4, 1993, memo from Rich, Feltmann's co-worker, Barnstead, told her that she polarized herself from the rest of the sales department and management because of the complaint she made in November concerning the sexual harassment by Anzalone, and was going to have a thick personnel file. (T. 3:140-141). After Barnstead's comment, Feltmann began receiving criticisms without basis that no other male sales consultants received. (T. 3:142). None of the male sales consultants, with the exception of Buetel's single memo regarding probation, ever received any memos of reprimand. (T. 2:101-102, 250-251; 3:26; 6:127, 239).

D. Use Of Company Demonstrator.

On February 23, 1993, Feltmann, and no male sales consultant, was given a memo from Rich restricting her use of the demonstrator to only the City of St. Louis and St. Louis County, not just the St. Louis area. (T. 3:106). However, the other male sales consultants drove their demonstrators out of the St. Louis area without permission and did not receive reprimands. (T. 2:74, 255-256; 3:25-26, 102-106; 6:141).

E. Guest Drives.

On April 9, 1993, Rich issued a memo requiring that he give permission for guest drives, whereby the customer is allowed to take the automobile for an extended length of time, and that the cars be logged out. (T. 3:73, 162-163). After the April 9th memo, Feltmann was never granted permission to overnight guest drive any automobile while Rich gave the male sales consultants such permission on numerous occasions. (T. 2:146-148; 3:165, 255; 6:31, 34-37, and 94-99). The guest log indicates that there were a number of overnight guest drives by other sales consultants after the April 9th memo. (T. 6:33-38). Furthermore, male sales consultants were not reprimanded for not logging cars out. (T. 2:155; 3:185-187).

Capps testified that, although there was a requirement to get Rich's permission to guest drive, if Rich was absent, one could guest drive and then talk with Rich after the fact. On two occasions, when management was unavailable, Feltmann allowed guest drives. (T. 3:198-200). On May 17, 1993, after discussing the matter with Jim Schlabach (the assistant manager) (T. 6:100), Rich fired Feltmann. (T. 3:201; 4:154). No Plaza Infiniti employee had ever been terminated or disciplined for failing to log out a guest drive or for allowing guest drives of automobiles without permission. (T. 3:200).

F. Loaning Of Cars To Customers During Snowstorm.

In February 1993, there was a snow storm and Feltmann loaned out two of the smaller model Infiniti automobiles to previous customers who could not drive their larger Infiniti cars in the snow because of poor traction. (T. 3:143, 145-146). Company policy encouraged the sales consultant to try to handle customer complaints. (T. 2:60-61; 4:10). However, Feltmann received a memo from Rich reprimanding her for the incident. (T. 3:147). Rich was shown at trial to have lied about the incident. (T. 2:90-93).

G. Rich's Refusal To Allow Feltmann To Drive Front Wheel Drive Vehicle During Snowstorm While Granting Permission To Males.

In February 1993, Rich allowed two male sales consultants to drive home different Infiniti models that were front wheel drive because of the snow, but would not allow Feltmann to do the same, so she was required to use a rear wheel drive vehicle. (T. 2:93-94). Feltmann was the only sales consultant to show up for work the next day in the snowy weather. (T. 2:94-95). Moreover, when she arrived at work, Rich told Feltmann to go home and when she remained at work, he indicated it was a violation of policy. (T. 2:95-96). However, when Rich left work early, Pandjiris called Rich and ordered him to get back to work. (T. 2:95-96).

H. Probationary Notice To Feltmann In March 1993.

In March 1993, Feltmann received another memo from Rich, placing her and Buetel on probation. (T. 2:249; 3:151). Another male consultant, Jones, was not placed

on probation, even though Jones sold less cars the prior two months, the prior year, and had lower CSI scores. As to gross profits, Brenner's and Jones' average gross profit figures were not dissimilar to Feltmann's, but neither received any memos or reprimands concerning their low gross profits. (T. 6:240). The memo stated that if she did not achieve the goals indicated to the Plaza Infiniti sales force, she would be terminated. (T. 3:152). In March, she sold eleven new Infiniti automobiles, whereas Jones only sold two and Buetel only sold five. (T. 3:154). Barnstead and Brenner sold fourteen and nine cars respectfully. (T. 3:154). Feltmann's average CSI score for the quarter through March of 1993 was 99.3 percent and her monthly average score for March was 100 percent; both scores were the highest among the Plaza Infiniti sales consultants. (T. 3:155-156).

I. Regional Walk Around.

In March 1993, Feltmann asked Rich to be allowed to participate in the regional walk around competition in Chicago, but Rich refused to allow her to do so while he gave Mike Barnstead and Scott Brenner the opportunity to go, and both declined. (T. 2:106, 206-208, 236-237; 3:156-158).

J. Feltmann Was The Only Salesperson Required To Pay For Brochures.

In April 1993, Rich required Feltmann to personally pay for Q45 sales brochures for her customers while none of the male sales consultants were required to do so. (T. 2:134-135; 3:192-194).

K. Other Instances Of Discrimination And Retaliation.

There were numerous incidents in which Feltmann was treated differently than her male co-workers after November 1992, including the following, which occurred just weeks prior to her termination:

1) *Rich Switching Sale With Male So Feltmann Received Less Commission.* In April 1993, Feltmann received a house deal that would have earned a substantial commission, but Rich switched the deal with Barnstead's house deal, resulting in Feltmann receiving a lower commission. (T. 3:181-182).

2) *Rich Approved Sales With Less Gross Profit For Males.* On April 15, 1993, Rich approved a deal for Brenner with a lower gross profit than a deal he refused to approve for Feltmann just days before. (T. 2:160-162).

3) *Assistant Manager Would Not Approve Customary Tire Switch.* On May 11, 1993, Feltmann could not get Schlabach to approve a switch of tires on a car she sold, even though it was done in the past, and therefore, she had to personally pay for a nearby gas station to perform the work. (T. 2:156; 3:188-191).

4) *Not Getting Off Telephone For Feltmann To Sign Orders But Doing So For Males.* Rich would not get off the phone to sign service department requests for Feltmann, but would do so for the male sales consultants. (T. 4:16, 19).

5) *Feltmann Was Replaced By A Male Sales Consultant.* After Feltmann was fired, she was replaced by a male sales consultant. (T. 5:46).

L. Fraud By Feltmann's Managers In Summer Momentum Program.

During the summer of 1992, Sieben participated in a sales incentive program run by the manufacturer entitled "The Summer Momentum Program" whereby sales consultants received monetary bonuses directly from the manufacturer. (T. 2:106; 3:107-108).

A separate bank account, in Rich's and Schlabach's names, was established to handle all bonus money. (T. 2:128-129, 3:238; 3:108-109). Rich falsified reports to the manufacturer by listing fictitious purchasers on the manufacturer reports to obtain additional bonuses. (T. 3:13-17; 4:185-186).

In early 1993, Feltmann received her 1099 tax form for 1992 from the manufacturer and it reflected $3,400.-00 as additional income from the Summer Momentum Program, and this additional amount was not paid to her, nor could she account for it. (T. 3:165-168). In February 1993, Feltmann told Schlabach that her 1099 was inaccurate and she continuously asked him where the extra money went, how much money the separate bank account contained, and what Schlabach planned for the extra money. (T. 3:167, 169-170). Upon investigation, Feltmann discovered a number of checks made out to her that she never received and on which her name was forged. (T. 3:178-180). She complained to Rich that her 1099 was inaccurate and that her checks were forged. (T. 2:119-120; 3:171). Rich admitted to Feltmann that he signed her name to some of the checks. (T. 3:175).

On April 14, 1993, the day before her taxes were due, upon request, Feltmann finally received a check to cover

her additional tax liability. (T. 3:176-177). However, before she could receive this check, Feltmann was required to sign a release. (T. 2:122-123; 3:177-178). Around the time Feltmann spoke to Rich about this situation, Schlabach was telling Rich that Feltmann should be disciplined or terminated. (T. 2:130-131).

Subsequent to Feltmann's termination, Schlabach left Sieben, Inc., after it was discovered that money was embezzled from the separate bank account and other sources. (T. 6:269-270). Schlabach was never prosecuted for embezzling. (T. 6:270). Moreover, Rich was never disciplined or reprimanded for his handling of the Summer Momentum Program separate bank account.

M. Rich Was Totally Discredited At Trial.

In reaching its decision in this case, the Eighth Circuit heavily relied on the testimony of Rich, even when contradicting evidence existed. Rich was seriously discredited at trial. For instance, Rich's main thrust in his campaign against Feltmann was that she was not selling cars, was doing a poor presentation, and was inappropriately relying on guest drives. (T. 2:226). Yet, when asked to name any customer that Feltmann gave a poor presentation to, Rich could only name one – Dr. Bayla Meyer. (T. 2:226; 3:225). However, the general manager, Pandjiris, received a note complimenting Feltmann's sales performance with Dr. Bayla Meyer! (T. 3:225-226; 5:36-37). Moreover, Rich testified that the "work ethic" memo, dated January 4, 1993, was written because he was not seeing any improvement in December after slow production in October and November. (T. 2:81-83). Rich testified that Feltmann was at the bottom of all salespersons in sales for December when, in fact, no one sold more cars than Feltmann that month. (T. 2:81-

83). Feltmann was a leader in CSI scores for the entire sales force for the majority of her employment at Plaza Motors (T. 3:205), yet for the partial month of May 1993, Rich wrote on the May report that she was below dealership average, by .4 of a point, while the same report indicated that she was ahead of both dealer and regional totals for the quarter and year to date. (T. 3:163-167). Similarly, Rich testified at trial that the separate bank account for bonus checks was not his idea, but stated to the contrary in deposition. (T. 2:108-209). Also, Rich has been fired from every previous automobile job and was later relieved of his position at Plaza Motors. (T. 2:41-45; 5:128). Moreover, Rich knew how to discriminate without overtly saying or doing so since his wife was a human resource manager. (T. 6:102).

N. Feltmann's Claims For Sexual Discrimination.

Feltmann elicited substantial evidence of sex discrimination. The Eighth Circuit, in its opinion, failed to give any inferences to Feltmann, and took upon itself the duty to reweigh the evidence and determine the credibility of witnesses. For instance, the Eighth Circuit concluded that no discrimination existed when Feltmann was placed on probation with Buetel. However, there was nothing that Rich could do to Feltmann at that point since she sold twice as many cars as Buetel, and more than any other male sales person except one. Thereafter, one of the most effective sales tools, guest drives, was taken away from Feltmann, under the pretense that permission would be required of all sales persons.

It is clear from the record that sufficient evidence existed to allow a jury to determine the ultimate fact of intentional discrimination since a reasonable juror could return a verdict for Feltmann based on the evidence.

Ryther, 108 F.3d at 835 (citing *Gardner v. Buerger,* 82 F.3d 248, 251 (8th Cir. 1996)).

O. Feltmann's Claims For Retaliation.

The evidence clearly showed that, after Feltmann made a harassment complaint, she was continually bombarded with memoranda of criticisms of her performance and threats of termination, until she was ultimately terminated. As the Eighth Circuit indicated in *Ryther,* it is difficult to show exactly the thought process of an employer who discriminates. *Ryther,* 108 F.3d at 848, n.6. Feltmann clearly made a prima facie case of retaliation in that 1) she complained of discrimination, 2) adverse action was taken against her, and 3) the adverse action was causally linked to the complaint of discrimination. *Marzec v. Marsch,* 990 F.2d 393, 395 (8th Cir. 1993).

In reversing the lower court, the court of appeals stated that the "termination six months after an incident is by itself insufficient to support a claim of causal connection." *See* Appendix A, p. 12a. What the court failed to note is that the record was replete with evidence that retaliatory actions were taken by Sieben, Inc. during the six month period following her complaint. Until Feltmann lodged her complaint against Anzalone, she never received criticisms relating to her performance. Again, as in Feltmann's discrimination claims, the Eighth Circuit seemed to require "direct" evidence of retaliation when retaliation can be shown through "indirect" or circumstantial evidence. *Jackson v. Delta Special Sch. Dist.,* 86 F.3d 1489, 1494 (8th Cir. 1996). Since sufficient evidence of causation was shown, any inferences of retaliation should be left to the jury. *Ryther,* 108 F.3d at 835.

P. Feltmann's Claim For Wrongful Discharge.

Feltmann clearly made a prima facie showing of wrongful discharge. *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993). From the time that Feltmann received her 1099 in late January or early February 1993, she was asking Schlabach and Rich the source of the extra income and, when she did not receive answers, she investigated and uncovered that Rich falsified reports to the manufacturer and forged her name. A clear inference can be drawn that Rich and Schlabach were trying to hide their fraud and firing Feltmann would be essential since she was the one with the most knowledge of their actions. Again, the Eighth Circuit wrongfully required "direct" evidence when proof of a causal connection in a wrongful discharge action can be established by indirect or circumstantial evidence. *Olinger v. General Heating and Cooling Co.*, 896 S.W.2d 43, 47 (Mo. App. 1994).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 16, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4058

Judith A. Feltmann,

Appellee,

v.

Sieben, doing business as
Plaza Motors Company, Inc.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 12, 1996

Filed: March 20, 1997

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and ROSENBAUM,[1] District Judge.

WOLLMAN, Circuit Judge.

Sieben, Inc. (Sieben) appeals from the judgment entered against it in Judith A. Feltmann's action alleging sex discrimination and retaliatory discharge under the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e

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[1]The HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota, sitting by designation.

et seq. (Title VII), the Missouri Human Rights Act, Mo. Rev. Stat. §213.010 et seq. (MHRA), and Missouri common law. We reverse.

I.

Plaza Infiniti is one of eight automobile franchises owned and operated by Sieben and housed at Sieben's Plaza Motor Company (Plaza). Bob Rich, then sales manager at Plaza Infiniti hired Feltmann as a sales consultant in September of 1991. Feltmann was the only female consultant at any of the Plaza franchises. During 1992, Feltmann's only full year at Plaza, Infiniti executives named her to the Pinnacle Club, an elite group of consultants recognized for high sales and consumer satisfaction.

In the summer of 1992, Infiniti instituted an incentive program that awarded consultants bonuses for each car sold. Overall sales were high, and Rich had little time to evaluate the consultants' selling methods. When overall sales began to decline after the incentive program ended, Rich felt pressured to increase sales and began evaluating consultants and requesting them to increase sales. Feltmann's sales declined after the incentive program, but she was still above half of all consultants for 1992 and, in December, tied with another consultant for the most sales that month. Feltmann's average gross profit for December of 1992, however, as well as January through April of 1993, was the lowest of all consultants. Rich testified that Feltmann's low profits on each car resulted from her failure to thoroughly explain the cars' features, a sales tactic that results in a higher selling price.

In November 1992, Feltmann's co-worker Mike Barnstead told her that Gordon Anzalone, a Sieben employee

who worked at a different franchise, had called her an extremely vulgar name. Feltmann wrote a letter to Rich the next day about the comment, and Rich reported the incident to Tony Pandjiris, the manager of Plaza Motors. Feltmann ultimately met with John and Tom Capps, Sieben's owners, who told Feltmann to report any future incidents. They also asked her if she wanted Anzalone fired, but Feltmann said she did not. They reprimanded Anzalone and told him that if anything like that happened again he would be terminated. Feltmann never heard of any other vulgar comments about her. In early January, however, Barnstead told Feltmann that she had polarized herself from the rest of the sales department and was going to have a thick personnel file. Feltmann assumed that this comment related to her complaint about Anzalone.

On January 4, 1993, Rich sent Feltmann a personal memo regarding her "work ethic." Rich's memo indicated he was unhappy with her mthod of selling. She was allowing "guest drives" – permitting prospective buyers to take an Infiniti for a short period of time without an accompanying consultant – too often and too soon in the selling process. Rich also thought she was not a "team player" and did not work well with other Plaza employees.

In March 1993, Rich placed Feltmann and another consultant, Rich Beutel, on probation because of their low sales performance in January and February of 1993. Feltmann and Beutel consequently rebounded by the end of March, and Feltmann sold more automobiles that month than all but one other consultant. Despite her high March sales, Feltmann was not allowed to participate in a sales competition in Chicago. Rich had offered the opportunity to participate to the two top

consultants at Plaza Infiniti. When they declined he did not offer the opportunity to Feltmann or to any of several male consultants who wanted to go.

Plaza Infiniti consultants were able to lease, at a low rate, a "demo" Infiniti for personal use. Following the drop in sales after the incentive program, Rich became concerned about costs at the dealership and restricted consultants' use of demo cars to the St. Louis area. Despite this restriction, Feltmann continued her weekly 300-mile round trips to Marion, Illinois, to visit her husband. On February 23, 1993, Rich sent Feltmann a personal memo reiterating that her use of her demo was restricted to the St. Louis area. No males received such a memo, even though Feltmann contends that they took their cars out of the St. Louis area occasionally. Feltmann continued to take her demo to Marion weekly until April 1993, two months after she received the personal memo from Rich and six months after the first restriction.

In January or February of 1993, Feltmann received her federal 1099 tax form, which included bonuses attributed to her from the summer 1992 incentive program. Her 1099 indicated more bonus income than she had actually earned. Casey Jones's and Beutel's 1099s also indicated larger bonuses than they had actually earned. Feltmann obtained copies of the checks addressed to her and discovered that someone had forged her signature for endorsement. The forgeries resulted from the system Plaza Infiniti used to handle consultants' bonus checks. Pandjiris would sign the consultants' checks, deposit them in a group account, and then issue the consultant a check on that account. Some consultants had given Rich and Pandjiris authority to sign their checks if the checks arrived in their absence. Although

Feltmann had not given her managers such authority, they signed her name anyway. Feltmann also discovered that she had been credited with sales she did not actually make. Feltmann complained to Rich that her 1099 showed income in excess of what she actually earned. On April 14, 1993, Sieben gave Feltmann a check covering her additional tax liability, but required her to sign a release stating that she held Plaza harmless for any claims relating to the incentive program. Sieben eventually discovered that Jim Schlabach, who had been in charge of the account, had been taking money from it, and terminated him.

Prior to April 9, 1993, Plaza Infiniti's guest drive policy provided that consultants were to use their "best judgment" in permitting a customer to guest drive a car. Feltmann allowed many more guest drives than any other consultant: Sieben's guest drive log reveals that between July of 1992 and April of 1993 she permitted 107, while the highest male consultant permitted forty-eight. In February of 1993, Rich reprimanded Feltmann when she loaned two small Infinitis to Infiniti owners who did not want to drive their own cars in a snowstorm.

On April 9, 1993, Rich announced a new guest drive policy. Consultants were not to loan out any cars without Rich's permission or without logging the cars in the guest drive log book. Overnight guest drives would no longer be permitted, and consultants had to accompany their guests. Before Rich left for a trip the weekend of May 15, he reiterated that no guests could drive the new Q45 without an accompanying consultant. Despite the April 9, memo and Rich's specific instruction, however, Feltmann permitted a customer to take a Q45 alone, and allowed another customer to keep a J30 model for the entire weekend, without getting permission or noting the guest drive in the log book.

The following Monday, May 17, 1993, Rich fired Feltmann because she had allowed these guest drives contrary to his specific instructions. Feltmann requested a meeting to review her discharge. She then met with Rich, Pandjiris, and John and Tom Capps and alleged that she had been discriminated and retaliated against. The Capps told her that they took her allegations very seriously and would investigate her complaints. Ultimately, the Capps found no merit in her allegations. John Capps, however, considered Feltmann a "salvageable employee" and had Pandjiris extend an offer of reinstatement to her. Feltman declined the offer, however, because Tom Capps refused her demand that he fire four male sales consultants, did not accord her complaints any merit, and would make no changes at the showroom. She also refused a position in another Sieben showroom. Feltmann subsequently worked at Lexus of St. Louis for ten months and then at St. Louis Acura for four months, until major depression, allegedly precipitated by her discharge from Plaza, forced her to quit.

After exhausting her administrative appeals, Feltmann brought this action alleging sex discrimination in violation of Title VII and the MHRA; retaliatory discharge in violation of Title VII and the MHRA; and retaliatory discharge under Missouri common law for reporting the forged checks. The jury found in favor of Feltmann and awarded her $112,661 in back pay, $20,072.24 in compensatory damages, and $25,000 in punitive damages on her Title VII sex discrimination claim. Sieben filed a motion for judgment as a matter of law (JAML) or, in the alternative, for a new trial or remittitur. The district court denied the motion and awarded Feltmann front pay of $72,668.38 for a two year period, together with costs and attorneys' fees.

II.

Sieben contends that the district court erred in failing to grant Sieben's motion for JAML on Feltmann's discrimination claims, both because Feltmann failed to establish her prima facie case and because she failed to introduce evidence sufficient to support a finding of discrimination.

We review de novo a district court's denial of a motion for JAML, applying the same standard used by that court. *See Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 345 (8th Cir. 1996). We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for JAML if reasonable persons could differ regarding the conclusions to be drawn from that evidence. *See, e.g., Ryther v. Kare 11,* No. 94-3622, slip op. at 25-26 (8th Cir. Mar. 6, 1997) (en banc); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056 (8th Cir. 1993).

In a discrimination case, the plaintiff bears the initial burden of establishing a prima facie case, which gives rise to a presumption of unlawful discrimination. *See Ryther,* slip. op. at 6. Once the plaintiff establishes the prime facie case, the burden shifts to the employer to produce evidence that its complained-of action was based on a legitimate, nondiscriminatory reason. *See id.* Upon the employer's satisfactory production of such evidence, the presumption of discrimination drops out, and the only remaining issue is the ultimate question of whether the employer intentionally discriminated against the plaintiff. *See id.*

When reviewing the denial of a motion for JAML on a discrimination claim, however, we need not "re-engage

in the [prima-facie step] analysis . . ., but instead limit our review to the ultimate factual issue of whether [the defendant] intentionally discriminated on the basis of [the plaintiff's] sex." *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 507 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (Feb. 5, 1997); *see also Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1101 (8th Cir. 1996); *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 733 (8th Cir. 1996); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800-01 (8th Cir. 1994). Thus, we must determine whether Feltmann adduced evidence " 'capable of proving that the real reason for h[er] termination was discrimination based on [gender].' " *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343, 345 (8th Cir.) (quoting *Boatmen's Bancshares*, 26 F.3d at 801), *cert. denied*, 117 S.Ct. 61 (1996). Feltmann was required to produce evidence of conduct or statements by persons involved in Sieben's decision-making process reflective of a discriminatory attitude sufficient to allow a reasonable jury to infer that that attitude was a motivating factor in Sieben's decision to fire Feltmann. *See J.C. Penney*, 75 F.3d at 345; *Kehoe*, 96 F.3d at 1102; *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). "We do not sit to determine if this reason is based on sound principles of business judgment . . . . Rather, the relevant inquiry is whether [Sieben's] decision was based on [gender]." *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1312 (8th Cir. 1995). Giving Feltmann the benefit of all reasonable inferences, we find no conduct or statements by persons involved in Sieben's decision to fire Feltmann from which a jury could reasonably infer that a discriminatory attitude was a motivating factor in Sieben's decision to discharge Feltmann.

Feltmann claims that she was treated differently from similarly situated male consultants, an allegation which, if established by evidence, would support a finding of sex discrimination. *See Kientzy,* 990 F.2d at 1060. The litany of incidents Feltmann recites, however, fails to support an inference of disparate treatment. Although Feltmann alone received a memo regarding her work ethic, Rich also talked to a male consultant about his work ethic, and Feltmann does not offer evidence of any other consultants whose work ethic Rich questioned but did not reprimand. Similarly, the fact that Rich put Feltmann on probation does not show discriminatory treatment, since Rich also put Feltmann's male coworker Casey Jones on probation for the same reason – declining sales in January and February 1993. Feltmann's contention that she was never given permission to allow a guest drive after April 9, 1993, though male consultants were, is also unconvincing. Feltmann could only specify one instance when Rich denied her permission after April 9, and he denied permission to at least two male consultants as well. Similarly, Feltmann's allegation that she was fired for not logging out two cars but that males who failed to log cars out were not reprimanded is unpersuasive. Feltmann was fired in part because she failed to ask permission, yet she admitted that she knew of no instance when a male consultant allowed a guest drive without getting permission. Thus, even though these male consultants may have been treated differently, they "cannot be considered similarly situated." *Johnson v. Baptist Medical Center,* 97 F.3d 1070, 1073 (8th Cir. 1996). In addition, Rich believed, and Feltmann admitted, that by not logging cars out or asking for permission, Feltmann was attempting to hide her actions from Rich.

Feltmann's other examples of disparate treatment are without merit. Her allegation that Rich swapped one of

her "house deals" (a deal brought in by a non-consultant and assigned to a consultant) with a less-profitable deal originally assigned to a male loses force when we consider that Feltmann, and no other consultant, had been given forty-one clients belonging to a consultant who left Plaza. Likewise, her claim that she was forced to drive her rear-wheel-drive Q45 in a snowstorm while the males could drive front-wheel-drive G20s is weakened by the fact that the male consultants asked for permission, but Feltmann did not. The fact that Rich sent Feltmann a personal memo reprimanding her for violating his November demo car memo, while males were not reprimanded, is similarly unhelpful; Feltmann drove her demo 300 miles every weekend until April of 1993, while the males' use was occasional at most and chiefly took place prior to Rich's November 1992 memo. Feltmann's claim that Rich refused to switch tires on a car Feltmann sold, although it "had been done in the past," proves nothing. Rich explained that he would no longer switch tires for anyone because tires are federally registered with a particular automobile and switching them created problems. Feltmann's claim that she, and no males, had to pay for the new, expensive Q45 brochures is likewise not persuasive; Feltmann was the only person who expressed a desire to furnish her customers with personal brochures, and she failed to prove that male consultants were given free brochures. Finally, with regard to Feltmann's allegation that Rich did not allow her to participate in the sales competition in Chicago, we note that the two men Rich wanted to send were Plaza's "two best salespeople," and he did not give the opportunity to any of several male consultants who wanted to participate in the competition.

Feltmann claims that Rich approved one male consultant's deal that yielded a lower profit than one of her deals that Rich denied. She also claims that Rich would not get off the phone to sign service orders for her, although he would for male consultants. Because she failed to introduce any specific evidence to substantiate these vague and conclusory claims, however, they are insufficient to support a claim of disparate treatment. *See Lidge-Myrtil,* 49 F.3d at 1311-12; *Davenport v. Riverview Gardens Sch. Dist.,* 30 F.3d 940, 945 (8th Cir. 1994).

We recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion, including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn,* 327 U.S. 645, 653 (1946), *quoted in Ryther,* slip op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See Ryther,* slip. op. at 8-10, 25. Because there was an absence of such evidence, the district court should have granted Sieben's motion for JAML on Feltmann's discrimination claims.

III.

Sieben next asserts that Feltmann failed to establish a prima facie case that she was retaliated against for reporting Anzalone's profane, harassing comment. To establish a prima facie case of retaliation, Feltmann must show that she complained of the harassing comment, that Sieben took adverse action against her, and that the adverse action was causally linked to her complaint. *See Marzec v. Marsh,* 990 F.2d 393, 396 (8th Cir. 1993).

We conclude that Feltmann failed to establish the necessary connection between her report and her discharge. Anzalone had no input into Sieben's termination decisions and worked at a different franchise on the Plaza Motors premises. The only evidence of retaliation Feltmann offered was Barnstead's comment that Feltmann had "polarized" herself from the rest of the salespeople and that she was going to have a "thick" personnel file. Barnstead, however, had no input into Sieben's firing decisions, and Feltmann offered no evidence that Barnstead's remark even related to her report. Anzalone's and Barnstead's remarks are "insufficiently serious" to support an inference of Sieben's retaliatory intent. *See Johnson*, 97 F.3d at 1073. Feltmann also alleged that her coworkers treated her "unfairly" and that her managers "singled her out." Such conclusory and unsubstantiated allegations, however, fail to support Feltmann's claim of retaliation. *See Davenport*, 30 F.3d at 945.

Furthermore, Rich, who ultimately discharged Feltmann, was concerned about Anzalone's comment and was principally responsible for bringing it to the Capps' attention. Similarly, the Capps' concern in dealing with the incident suggests, if anything, that Sieben was willing to confront and rectify Feltmann's harassment claims. Feltmann herself admitted that her complaint was handled efficiently and to her satisfaction. Finally, Rich did not discharge Feltmann until six months after she reported Anzalone's comment. The fact of termination six months after an incident is by itself insufficient to support a claim of causal connection. *See Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992). Because Feltmann failed to adduce any evidence capable of proving a causal connection between her report and discharge, the district court erred in not granting JAML, on this count of Feltmann's complaint.

IV.

We conclude that the same failure of proof exists with respect to Feltmann's allegation that she was fired for reporting the problems with the incentive bonus account. Sieben terminated Schlabach upon discovering that he had been taking money from the bonus account, which suggests that Sieben was not trying to protect itself or Schlabach. Moreover, Schlabach was not Feltmann's superior and was not involved in the decision to fire Feltmann. Although Feltmann notes that Rich discharged her six weeks after the complaint, mere temporal proximity is insufficient to link Feltmann's report to her discharge. *See J.C. Penney*, 75 F.3d at 346-47 (plaintiff fired a month after he filed age discrimination charge failed to establish causal link without evidence in addition to temporal proximity); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86-87 (8th Cir. 1990) (close proximity between plaintiff's filing of charges and plaintiff's discharge was a mere "slender reed of evidence"; any conclusion of temporal proximity would be "rank speculation"). Accordingly, the district court should have granted Sieben's motion for JAML on this count.

V.

Because Feltmann's claims find no support in the evidence, her claim for punitive damages must perforce also fail.

The judgment is reversed, and the case is remanded to the district court with directions to enter judgment in favor of Sieben, Inc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4058EMSL

Judith A. Feltmann,

Appellee,

vs.

Sieben, doing business as
Plaza Motors Company, Inc.,

Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion. The petition for rehearing by the panel is also denied.

June 18, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

[Filed May 16 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Case Number: 4:94CV562 SNL

JUDITH A. FELTMANN,

Plaintiff,

v.

SIEBEN, INCORPORATED,

Defendant.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, Judith A. Feltmann recover of defendant Sieben, Incorporated, compensatory damages in the amount of One Hundred Thirty Two Thousand Seven Hundred Thirty Three and Twenty Four Cends ($132,733.24) with interest at the rate of 6.28% from the date of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Judith A. Feltmann recover of defendant, Sieben, Incorporated punitive damages in the amount of Twenty Five Thousand Dollars ($25,000.00) with interest at the rate of 6.28% from the date of this judgment.

IT IS FINALLY ORDERED AND ADJUDGED that defendant Sieben, Incorporated shall bear the costs of this action.

/s/ Stephen N. Limbaugh
STEPHEN N. LIMBAUGH
UNITED STATES DISTRICT JUDGE

Dated this 16TH day of May 1995.

APPENDIX D

[Filed Nov 16 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94 CV 562 SNL

JUDITH A. FELTMAN,

Plaintiff,

vs.

SIEBEN INC. d/b/a PLAZA MOTORS,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on several post-trial matters. The Defendant has filed motions for Judgment as a Matter of Law (101), For a New Trial (101), To Alter or Amend the Judgment (101), to Strike an Affidavit (106) and for a Hearing Regarding the Details of Reinstatement (109). The Plaintiff has filed a Motion for Front Pay (105) and for Attorney Fees (127). The Court will address the issues of altering the judgment, the supplemental affidavit, the Plaintiff's equitable remedy, and the Plaintiff's costs and attorney fees in that order.

The Defendant's motions for altering the judgment and new trial are denied. The Court's record developed during the trial and during the instruction conference fully set out the Court's position and require no further discussion because the briefs do not present any significant new arguments.

The Defendant's motion to strike the supplemental affidavit is also denied. Although the affidavit is not necessary because the Court had already made the decision that the witness was unavailable to testify in accordance with Fed.R.Evid. 804(a); its inclusion had no effect on that decision.

The next issue is the question of the Plaintiff's equitable remedy. The Plaintiff may seek front pay or reinstatement. Although reinstatement may be encouraged, the facts of this case make front pay preferable. The animosity that has developed between the parties as a result of the previous working conditions and the confrontational nature of the trial make reinstatement impossible.

The only question that remains is the amount of front pay. The Plaintiff has only asked for two years salary to allow her to develop a customer base that would be equivalent to the base she had at her position with the Defendant.

The Plaintiff has put forth a dollar amount and the Defendant challenges it. The Defendant's challenge comes in the form of comparisons to other sales consultants at other dealerships. The Defendant's analysis is flawed because, as the Defendant vigorously argued during the trial, the operations of the Defendant's other dealerships have no bearing on this case. The issues in this case are narrowly defined to relate solely to the operation of the Infinity dealership.

The award of front pay is intended to compensate the Plaintiff for the illegal actions of Sieben Inc. The amount and duration of that amount is left to the discretion of this Court. The only limit on the Court's discretion is that the Court avoid speculation. In order to avoid speculation, the Court will base the dollar amount on the

findings of the jury and the Plaintiff's ability to mitigate her damages. Based on a two year mitigation of eighty thousand dollars ($80,000) from a two year damage award of one hundred fifty two thousand six hundred sixty eight and 38 cents ($152,668.38) the Court finds that seventy two thousand six hundred sixty eight and thirty eight cents ($72,668.38) is the appropriate amount of front pay.

The next issue is the question of costs that were incurred by the Plaintiff in the litigation of this matter. The Court is willing to allow taxing of the majority of the costs, but it will not allow taxing for exhibits which were not used at trial nor will it allow taxing for special process servers. Some circuits have reasoned that since Fed.R.Civ.P. 4(c) contemplates private process servers, the statute naturally includes them. *See, Alflex Corporation v. Underwriters Laboratories, Inc.*, 914 F.2d 175, 178 n.6 (9th Cir. 1990); *Griffith v. Mt. Carmel Medical Center*, 157 F.R.D. 499 (D.Kan. 1994); however the eight circuit maintains that special process servers are not mentioned in §1920 so they cannot be taxed. *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985). Accordingly, the Court will reduce the costs by four hundred eighty three dollars and twenty cents ($483.20) for the use of special process servers. The Court finds that the rest of the Plaintiff's costs, including the supplemental costs, are well founded and appropriately documented. Accordingly the Court awards and the Clerk will tax fourteen thousand two hundred fifty one dollars and eighty seven cents ($14,251.87).

Finally, the Court will turn to the question of fees. As a prevailing party, the Plaintiff is entitled to recover reasonable fees under Title VII and §213.111 R.S.Mo. There is no question that the Plaintiff was the prevailing

party as the jury returned a verdict in her favor on all counts. The only question raised by the Defendant is the reasonableness of the fee.

The specific objections raised by the Defendant include the loadstar figures for Mr. Reis' counsel, paralegal fees, court time, and work done that related to the Plaintiff's husband. The Court finds that the fees charged by Mr. Reis and his cocounsel, all of which are under one hundred and fifty dollars an hour ($150.00), are reasonable amounts for this type of work in the St. Louis legal community.

The paralegal fees are also reasonable. The Court encourages the use of less expensive assistants to perform basic tasks necessary to the proper litigation of claims. The objection to court time for Mr. Reis' associate is also rejected. The Court takes note of her academic performance but bases its decision on her active role in the trial, not her transcript.

Finally, the Court dismisses the Defendant's objection to the Plaintiff's inclusion of time spent on the Stuart Ziglin matter. The Defendant's strategy to attempt to include extraneous information about the Plaintiff's husband's criminal record was an issue that the Plaintiff had to address as a part of her case and does not constitute unrelated legal work that was done for the benefit of the Mr. Ziglin.

The four volume file speaks to the effort expended by both counsel to represent their clients in what they viewed as an appropriate manner. The chosen style of representation led to the filing of a variety of pleadings and numerous appearances before the Court. The seven post trial motions filed by the parties and the additional six pleadings that relate solely to the issue of costs are examples of that chosen style.

The Court addresses the numerous pleadings and their voluminous nature because that has a direct effect on this Court's view of the reasonableness of the Plaintiff's fee. The Court finds that the legal questions presented were not of an unusually complex nature; however, the position put forth by the Defendant and the inability of counsel to work together as professionals made the underlying facts difficult to discover and necessitated constant intervention by the Court.

The Court approves the One hundred eighty thousand four hundred fifty seven dollar ($180,457) fee of counsel as reasonable, but cuts the fee by fifteen percent to account for the unwieldy nature this case took on as a result of both counsel's inability to work together. Their actions led to unnecessary pleadings and appearances which cannot be borne as the burden of the client. Therefore, the Plaintiff is awarded one hundred fifty three thousand three hundred eighty eight dollars and forty five cents ($153,388.45).

Accordingly,

IT IS HEREBY ORDERED that the Defendant's Motions for Judgment as a Matter of Law (#101), Motion for a New Trial (#101), Motion to Alter or Amend the Judgment (#101), and for Motion to Strike the Supplemental Affidavit (#106) are DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion for a Hearing (#109) is DENIED as moot as that hearing has already been held.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Front Pay (#105) is GRANTED and she is awarded seventy two thousand six hundred sixty eight and thirty eight cents ($72.668.38) in front pay.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Costs in GRANTED and she is awarded fourteen thousand two hundred fifty one dollars and eighty seven cents ($14,251.87) in costs.

IT IS FINALLY ORDERED that the Plaintiff's Motion for Attorney Fees is GRANTED and the Plaintiff is awarded one hundred fifty three thousand three hundred eighty eight dollars and forty five cents ($153,388.45).

Dated this 16th day of November, 1995.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

(2)

No. 97-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDITH A. FELTMANN,
Petitioner,

v.

SIEBEN, INC., d/b/a PLAZA MOTORS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

1. In order to withstand an employer's motion for summary judgment or judgment as a matter of law in a discrimination action, must a plaintiff only establish a *prima facie* case of discrimination along with pretext, as held by the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits; establish a *prima facie* case along with pretext and proof that discrimination was the real reason for the employer's actions, as held by the First, Second, Fourth and Fifth Circuits; or must plaintiff provide direct evidence of discrimination, as held by the Eighth Circuit?

2. Whether the Eighth Circuit Court of Appeals erred by misapplying the standard for review, whereby the court should not reverse a jury verdict unless there is a complete absence of probative facts to support the conclusion reached, when it reversed the jury's verdict on all five counts?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sieben, Inc., d/b/a Plaza Motors, respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported as *Feltmann v. Sieben*, 108 F.3d 970 (8th Cir. 1997) and is attached to the Petition for a Writ of Certiorari as Appendix A. The Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on June 18, 1997. The order denying the Petition for Rehearing is not officially reported and is attached to the Petition for Writ of Certiorari as Appendix B.

The District Court's judgment in *Feltmann v. Sieben*, No. 4:94CV562 SNL (E.D.Mo.) was filed on April 12, 1995, and is not officially reported. A copy of that judgment is attached to the Petition for Writ of Certiorari as Appendix C. The district court's opinion regarding post-trial motions was filed on November 16, 1995, and is not officially reported. A copy of that opinion is attached to the Petition for Writ of Certiorari as Appendix D.

JURISDICTION

This Court has jurisdiction to review the order dated June 18, 1997 denying Feltmann's Petition for Rehearing and Suggestions for Rehearing en banc of the Court of Appeals for the Eighth Circuit by a Petition for a Writ of Certiorari filed on or about September 16, 1997, pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

The Court of Appeals for the Eighth Circuit had jurisdiction over this appeal from the judgment of the United States District

Court pursuant to 28 U.S.C. §1291. The District Court had jurisdiction of this claim of a violation of Title VII, 42 U.S.C. §2000e, *et seq.* pursuant to 28 U.S.C. §1331.

STATUTES INVOLVED IN THIS CASE

Title VII, 42 U.S.C. §2000e, *et seq.*, is set forth in the Petition for Writ of Certiorari at page 3.

STATEMENT OF THE CASE

Petitioner Judith A. Feltmann ("Feltmann") was discharged from her position as a commissioned car sales consultant with Respondent Sieben, Inc. ("Sieben"). Sieben owns and operates eight car franchises, all at the same location, in the St. Louis area. (T. 5-80). In 1989, Sieben opened an Infiniti franchise (hereinafter, Sieben's Infiniti franchise will be referred to as "Plaza Infiniti"). (T. 5:81). Bob Rich was hired to be the Sales Manager of Plaza Infiniti. (T. 5:82).

In September, 1991, Bob Rich hired Feltmann to be a commissioned sales consultant at Plaza Infiniti. (T. 2:53-54; 2:170; 3:59). As a commissioned sales consultant, Feltmann, along with four other sales consultants, was engaged in the selling and leasing of Infiniti automobiles. (T. 3:60).

In November, 1992, another employee informed Feltmann that Gordon Anzalone, a sales consultant in Sieben's Lexus showroom, had called her an extremely vulgar name. (T. 6:123-24).[1] On November 13, 1992, Feltmann wrote a letter to Rich about the comment. (T. 3:93-3:96; App. 1:181). Rich reported the comment to Tony Pandjiris, Sieben's General Manager. (T. 3:96). Feltmann ultimately met with John and Tom Capps, two of Sieben's owners, who told her to report any future incidents.

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[1] The Lexus dealership is housed in a different building from Plaza Infiniti. and is managed by a different manager. (T. 4: 32, 5:105).

(T. 5:107, 6:254-55). They also asked Feltmann if she wanted Anzalone fired, but Feltmann said she did not. (T. 5:108). The Capps reprimanded Anzalone and informed him that if he ever used such language again, he would be discharged. (T. 5:108). Thereafter, Feltmann had no further problems with Anzalone. (T. 3:98, 4:34, 5:109).

On January 4, 1993, Rich sent Feltmann a personal memo regarding her "work ethic." (App. 1:106). Rich's memo indicated that he was unhappy with her method of selling. (App. 1:106). She was allowing "guest drives" - permitting prospective buyers to take an Infiniti without an accompanying consultant - too often and too soon in the selling process. (App. 1:106). At about the same time, Rich spoke with Rick Beutel, a male sales consultant, about deficiencies in his selling methods. (T. 2:84).

In January and February, business continued to decline at Plaza Infiniti. (T. 2:201). Rich experienced pressure from his management to improve business. (T. 2:201-02). On or about March 3, 1993, Rich established sales goals for all of the sales consultants and informed Feltmann and Rick Beutel that if they did not make the goals, they would be discharged. (App. 1:109-10; T. 2:99-100, 2:201-03). Feltmann and Beutel each received a memorandum informing them that they had been placed on probation. (App. 1:109; T. 2:99-2:100, 2:249-51). Feltmann and Beutel rebounded by the end of the month.

A. The Circumstances Of Feltmann's Discharge

Plaza Infiniti had a practice of permitting a potential customer to take an automobile, overnight or for the weekend, without an accompanying sales consultant. (T. 2:53). Prior to April, 1993, Rich permitted his sales consultants to use their own discretion in determining when a potential customer could take a car in this fashion. (T. 2:139-2:141). The sales consultant was to record the

car in the "guest drive" log, a log kept so that Rich would at all times know where the inventory was. (T. 2:147-48, 3:40-41, 3:124-25, 3:159).

In April, 1993, Rich announced a new guest drive policy. (T. 2:139-41, 2:149). Rich provided all sales consultants with a memorandum, informing them that overnight guest drives would no longer be permitted without Rich's permission, and that the sales consultants had to accompany all customers on a guest drive. (App. 1:114; T. 2:136-41, 2:208, 6:90).

In April, 1993, Plaza Infiniti received its first shipment of the new model of Infiniti, the 94 Q45. (T. 2:208-09, 6:228-29). On the weekend of May 15, 1993, Rich went to Chicago. (T. 6:90). Prior to going to Chicago, he gave instructions to all of the sales consultants that no one was to give one of the 94 Q45s to a customer for a guest drive without accompanying the customer. (T. 2:210-11, 6:90, 6:228-29).

On Saturday, May 15, 1993, while Rich was in Chicago, Feltmann permitted a customer to guest drive the 94 Q45 from 10:30 a.m. to 4:00 p.m. without accompanying the customer. (T. 3:195-97). In addition, Feltmann failed to record the car on the guest drive log so that Rich would not know that she had put the car on guest drive in violation of his instructions. (T. 3:231-32). In addition, over that weekend, Feltmann allowed another customer to take a J30T for an overnight guest drive, without obtaining Rich's permission. (T. 3:199, 3:230-31). This action violated the directive of the April 9, 1993 guest drive memorandum. (T. 2:211-12). Again, Feltmann failed to record this car on the guest drive log in an attempt to hide her actions from Rich. (T. 3:231-32).

When Rich learned of these incidents, Rich concluded that Feltmann had disobeyed his direct instructions with respect to

the 94 Q45 and the J30T.[2] (T. 2:211-12, 6:90-92). Rich also concluded that she had failed to record the cars on the guest drive log because she was trying to deceive him. (T. 2:211-12, 6:90-91). As a result, Rich discharged Feltmann on May 17, 1993, upon his return from Chicago. (T. 6:90-6:91).

B. Sieben's Review Of Feltmann's Discharge

On May 17, 1993, the day that Rich informed Feltmann of her termination, Feltmann asked for a review of her discharge, claiming that she had been discriminated against. (T. 4:154-55, 5:112, 6:258; App. 1:125). On May 18, 1993, Feltmann met with Rich, Tony Pandjiris, the General Manager of Plaza Motors, and John and Tom Capps, and informed them that she thought that she had been discriminated against. (T. 4:56, 5:113-16, 6:258-9). Feltmann also asked for her job back. (T. 4:154-55, 5:117-18).

The Capps investigated her complaints, but they found no merit in her allegations. (T. 5:118-19, 6:261-62). John Capps, however, believed that Feltmann was a "salvageable employee," and he directed Tony Pandjiris to extend an offer of reinstatement to Feltmann. (App. 1:116-17; T. 4:156, T. 5:23-25, T. 5:119-20, T. 6:91-92, T. 6:266-67). Pandjiris extended the offer of reinstatement, but Feltmann declined the offer because Sieben refused her demand that Sieben fire four other employees, did not afford her complaints any merit, and would not make any changes in the showroom. (T. 6:262-63). Tom Capps also asked her whether she would be interested in a job in another showroom. (T. 6:262-64). Feltmann told him that she did not believe that she would have the same opportunities in another showroom that she had at Plaza Infiniti. (T. 6:263-64).

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[2] Rich believed that Feltmann had violated the April 9 memorandum by allowing Quinn to take the J30T on an overnight guest drive. (T. 6:90, 2:211-12).

C. The Trial And Jury Verdicts

Feltmann's Complaint alleged that she was discharged in violation of Title VII, 42 U.S.C. §2000e *et seq.*, the Missouri Human Rights Act ("MHRA"), Mo.Rev.Stat. §213.010 *et seq.*, and the Missouri common law.[3] Feltmann adduced no evidence of any comments that had been made by Rich, or any of the decision-makers, that would indicate gender bias and she adduced no comments indicative of retaliatory animus. Instead, Feltmann's evidence was directed to an attempt to demonstrate that she had been treated differently from the other employees of Plaza Infiniti.

The jury found in favor of Feltmann on all of the claims that she submitted to the jury: 1) sex discrimination in violation of Title VII, 2) retaliation in violation of Title VII, 3) sex discrimination in violation of the MHRA, 4) retaliation in violation of the MHRA, and 5) wrongful discharge. The jury awarded Feltmann the sum of $112,661.00 for back pay, $20,072.29 for compensatory damages, and $25,000.00 in punitive damages on her Title VII sex discrimination claim. (App. 1:43). The district court overruled Sieben's Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, or in the Alternative, to Alter or Amend the Judgment. (App. 1:45A, 2:177).

Thereafter, the District Court held a hearing on the equitable issues. In its Order of November 16, 1995, the District Court awarded front pay for a two year period in the total amount of

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[3] Feltmann alleged a claim of wrongful discharge under the Missouri common law. However, Feltmann primarily argues that the Petition should be granted so that this Court can review certain Title VII issues. Although she includes a discussion of the evidence that she believes supports her state law claims, this argument is simply a peripheral argument. Moreover, as set forth, *infra*, a review of the sufficiency of evidence on a common law claim is not a matter for this Court's review. Accordingly, Sieben has not set forth the evidence relevant to the common law claims.

$72,668.38, attorneys' fees in the amount of $153,388.45 and costs in the amount of $14,251.87. (App. 1:47). In this Order, the District Court denied Sieben's Motion for a Judgment as a Matter of Law, or in the Alternative, for a New Trial, or in the Alternative, for Remittitur. (App. 1:47). Thereafter, on November 22, 1995, Sieben filed a timely Notice of Appeal of the judgments of the District Court. (App. 1:53).

D. The Opinion Of The United States Court Of Appeals For The Eighth Circuit

The United States Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and entered judgment with respect to Sieben on all of Feltmann's claims. The Court conducted a *de novo* review of the district court's denial of the judgment as a matter of law. (Petitioner's Appendix, 7a, hereinafter referred to as "Pt.App. "). The Court reviewed each item of evidence that Feltmann presented of disparate treatment and concluded either that the employees cited were not "similarly situated" to Feltmann or that she had failed to provide specific evidence to substantiate the "vague and conclusory claims." (Pt.App., pp. 7a-11a).

Citing the *en banc* opinion of *Rythers v. Kare 11*, 108 F.3d 832 (8th Cir. 1997), *cert. denied*, 117 S.Ct. 2510 (1997), the Court held:

> We recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion, including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946), *quoted in Ryther*, slip. op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See*, *Ryther*, slip. op. at 8-10, 25. Because

> there was an absence of such evidence, the district court should have granted Sieben's motion for JAML on Feltmann's discrimination claims.

(Pt.App., p. 11a). Similarly, the Court found that Feltmann had failed to adduce sufficient evidence of disparate treatment to make a submissible case with respect to her retaliation claims. (Pt.App., pp. 11a-12a).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit has never held that a plaintiff may make a submissible case only by proving direct evidence of discrimination. In the instant case, the Court did not require Feltmann to adduce direct evidence of discrimination.

The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, has specifically acknowledged that a plaintiff may make a submissible case by adducing evidence of pretext. *Rythe*r *v. Kare 11*, 108 F.3d 832, 837 (8th Cir. 1997)(en banc). The Court further held that in certain classes of cases, simply proving pretext is insufficient if the evidence of pretext, standing alone, is inconsistent with a finding of discrimination. (*Id.*) In the instant case, the Court relied upon the *en banc* decision in *Rythe*r, and held that on the evidence adduced, Feltmann had failed to make a submissible case.

Feltmann claims that this Court should grant the Petition for a Writ of Certiorari because she claims that there is a conflict in the circuit courts with some courts holding that a plaintiff makes a submissible case merely by adducing evidence of pretext ("pretext only" circuits), while other circuit courts require a plaintiff to meet a higher standard of proof by adducing additional evidence of discrimination ("pretext-plus" circuits). However, Feltmann's claims were decided under the *Rythe*r standard, a standard that specifically recognizes that pretext is sufficient. The Eighth Circuit held that Feltmann's claims failed under the

lower standard. Accordingly, even if the higher standard of "pretext-plus" is the appropriate standard, Feltmann's claims fail. Thus, the resolution of any conflict among the circuits has no bearing on the outcome of this case. Any decision by this Court regarding the appropriate standard of proof would be an advisory opinion. Inasmuch as this Court lacks the power to issue advisory opinions, the Petition for Writ of Certiorari should be denied. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993).

In Point II, Feltmann claims that the United States Court of Appeals for the Eighth Circuit used the wrong standard in reviewing the evidence to determine whether Feltmann made a submissible case. To the contrary, the Court used the correct standard and correctly concluded that Feltmann failed to make a submissible case. Any mistake in the application of the law to the evidence in the case is not an appropriate basis for the grant of a writ of certiorari. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The Eighth Circuit has never held that a plaintiff in a discrimination case must adduce direct evidence in order to make a submissible case, and the Eighth Circuit did not hold that Feltmann had to adduce direct evidence in order to make a submissible case. In *Ryther v. Kare 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), *cert. denied*, 117 S.Ct. 2510 (1997), the Eighth Circuit, sitting *en banc*, held that the elements of the *prima facie* case, together with evidence of pretext, are sufficient for a plaintiff to make a submissible case. (*Id.* at 837). The Court held that in certain cases, evidence of pretext, is insufficient if the evidence of pretext is inconsistent with a finding of discrimination. (*Id.*)

In the instant case, the Court relied on its holding in *Ryther*, and determined that Feltmann had failed to make a submissible case. To the extent that there may be a conflict among the circuits with some circuits requiring "pretext only," and other circuits requiring the higher standard of "pretext plus," the resolution of the conflict has no bearing on the instant case because Feltmann's claims fail under a standard that specifically recognizes that pretext alone is sufficient. Thus, the Petition for a Writ of Certiorari is simply a request that this Court enter an impermissible advisory opinion. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993).

In Point II, Feltmann requests that this Court grant a Writ of Certiorari to review the evidence to determine whether the Court of Appeals was correct in its holding that Feltmann failed to make a submissible case. Certiorari is not granted to review evidence or discuss specific facts. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.).

A. The Eighth Circuit, Sitting *En Banc*, Has Held That A Submissible Case Has Been Made If A Plaintiff Adduces Evidence Of The Elements Of The *Prima Facie* Case, Together With Evidence Of Pretext

Although Feltmann asserts that the Eighth Circuit has been inconsistent in its rulings on the issue, Feltmann omits any discussion of the Court's *en banc* opinion in *Ryther v. Kare 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), *cert. denied*, 117 S.Ct. 2510 (1997).[4] In *Ryther*, the Court set forth the role of pretext evidence in light of its understanding of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). With the exception of the instant case, all of the opinions of the Eighth Circuit that Feltmann cites as examples of inconsistent opinions were decided prior to *Ryther*. Any conflicts that existed within the Eighth Circuit prior to *Ryther* are irrelevant in light of the *en banc* decision in *Ryther*. Moreover, any conflicts within the Eighth Circuit are the subject for *en banc* hearing by the Eighth Circuit, not for review by a Writ of Certiorari in this Court. *See*, Fed. R. App. P. 35(a).

In *Ryther*, the Eighth Circuit engaged in *en banc* review "for the sake of guidance to the bar and district courts . . . to unify and clarify [the Court's] understanding of the Supreme Court's standard." (*Id.* at 836.) The Court set forth the standard as follows:

> . . . when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. *The elements of the prima facie case remain, however, and if they*

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[4] Although there were concurring and dissenting opinions in *Ryther*, eight of the eleven active judges on the Eighth Circuit joined in Point II of the opinion of the Court, the portion of the opinion in which the Court specifically held that evidence of the *prima facie* case, coupled with pretext, is sufficient to support a jury verdict.

> *are accompanied by evidence of pretext and disbelief of the employer's explanation, they may permit the jury to find for the plaintiff.* This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of . . . discrimination.

Ryther, supra, 108 F.3d at 837 (emphasis supplied). Thus, the Court specifically held that a plaintiff who adduced evidence of a *prima facie* case, along with evidence of pretext, could make a submissible case. The Court went on to hold that in certain kinds of cases, proving pretext is not enough if the evidence is inconsistent with a finding of discrimination. In elucidating the circumstances in which pretext evidence is inconsistent with a finding of discrimination, the Court cited three cases: *Rothmeier v. Investment Advisors*, 85 F.3d 1328 (8th Cir. 1996); *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986); and *Visser v. Packer Engineering Assoc.*, 924 F.2d 655 (7th Cir. 1991).

In *Rothmeier*, the plaintiff adduced evidence of pretext by adducing evidence that he was discharged because he confronted his employer about securities violations. Thus, even though he adduced evidence of pretext, that evidence was inconsistent with a finding of discrimination.

In *Barber*, the plaintiffs adduced evidence that plaintiff had been treated differently from others within the protected class who had been treated more favorably. Again, any evidence of pretext was inconsistent with a finding of discrimination because other individuals in the protected class had been treated more favorably than the plaintiff. Thus, as the Court noted, "the evidence of pretext did not support a reasonable inference of . . . discrimination." *Ryther*, 108 F.3d 832, 837 n. 4 (8th Cir. 1997).

In *Visser*, the district court entered judgment in favor of the plaintiff, on an age discrimination claim, because it held that the employer's actions violated the norms of corporate conduct. 924 F.2d at 657. The plaintiff conceded that he was discharged because he was disloyal to the chief executive officer. The United States Court of Appeals for the Seventh Circuit reversed the judgment, and held that if the employee was fired for disloyalty, which he conceded, such a finding was inconsistent with a finding of age discrimination. (*Id.*) Thus, in the cases cited in *Ryther*, the plaintiff's pretext evidence was inconsistent with a finding of discrimination.

The *Ryther* opinion is consistent with this Court's opinion in *Hicks*. In *Hicks*, the district court found that the employer's explanation was false but also held that the plaintiff had failed to prove that the employer's conduct was racially rather than personally motivated. The district court entered judgment in favor of the employer. The United States Court of Appeals for the Eighth Circuit reversed, holding that once the fact-finder determined that the proffered reason was false, the plaintiff was entitled to a directed verdict in his favor.

In reversing the appellate court, this Court held that proof that the articulated reason is false, standing alone, does not entitle the plaintiff to judgment. Pretext evidence may be enough to sustain a verdict for the plaintiff. However, the pretext evidence must be sufficient to demonstrate that the employer intentionally discriminated against the employee.[5] 509 U.S. at 515, 113 S.Ct. at 2752. To meet this burden, the plaintiff does not have to adduce *additional* evidence of discrimination. As this Court held,

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[5] This Court noted that after the defendant has satisfied its burden of adducing a non-discriminatory reason for the employment action, the burden created by the prima facie case drops from the case and is no longer relevant. At this stage, i.e., the pretext stage, the trier of fact proceeds to the ultimate question: whether the employee has proven that the employer intentionally discriminated against the employee. 509 U.S. at 510-11, 113 S.Ct. at 2749

"rejection of the employer's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . and upon such rejection, 'no additional proof of discrimination is *required*.'" 509 U.S. at 510-11. The Court noted that "[e]ven though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*." 509 U.S. at 511 n. 4. Thus, this Court recognized that there may be some cases in which the overall strength of the *prima facie* case, along with evidence of pretext, will be sufficient, while in other cases such evidence will not be sufficient. In all cases, the evidence must be sufficient for a reasonable fact-finder to conclude that the defendant has discriminated against the plaintiff. *See*, *Rothmeier*, *supra*, 85 F.3d at 1334-35.

In *Ryther*, the Eighth Circuit noted that in some cases, the *prima facie* case, along with the evidence of pretext, is sufficient for the jury to return a verdict for the plaintiff. 108 F.3d at 837. In addition, recognizing that the plaintiff must adduce sufficient evidence for a reasonable fact-finder to conclude that the employer discriminated against the plaintiff, the Court held that where the evidence is inconsistent with a finding of discrimination, the plaintiff has failed to make a submissible case.

B. The Eighth Circuit Does Not Require Direct Evidence And The Court Did Not Require Feltmann To Adduce Direct Evidence

In the instant case, the Court conducted a thorough review of Feltmann's evidence in an attempt to find some evidence to support the jury's verdicts. In its holding, the Court cited and relied on *Ryther*. The Court specifically acknowledged that in some cases, evidence of pretext might be sufficient. The Court stated:

> [w]e recognize that a jury may discredit or disbelieve whatever alleged facts are inconsistent with its conclusion,

> including the employer's proffered reason for the plaintiff's discharge, as long as evidence supports the jury's verdict. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946), *quoted in Rythe*r, slip. op. at 27. As this statement presupposes, however, sufficient evidence must still exist to form a basis upon which a reasonable jury could rest its conclusion that the employer's decision stemmed from intentional discrimination. *See*, *Rythe*r, slip. op. at 8-10, 25.

(Pt.App., p. 11a). As the foregoing passage demonstrates, in the instant case, the Eighth Circuit correctly stated the law as set forth by the Eighth Circuit in *Rythe*r. The Eighth Circuit held, as discussed *infra*, that there was a complete lack of evidence supporting Feltmann's claims.

Feltmann claims that the Court required her to adduce direct evidence of discrimination and appears to suggest that this is the law of the Eighth Circuit. To the contrary, the Eighth Circuit has never held that a plaintiff, in a case that does not involve a reduction in force, must adduce direct evidence to make a submissible case.[6] The Eighth Circuit has specifically held that a plaintiff may adduce either direct or circumstantial evidence. *See*, *Rythe*r, *supra*, 108 F.3d at 836; *Rothmeier*, *supra*, 85 F.3d at 1331; *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992).

Contrary to Feltmann's assertions, the Eighth Circuit neither held nor suggested that Feltmann could make a submissible case only by adducing direct evidence. Feltmann adduced no evidence that any decision-maker ever made any discriminatory remarks. Thus, Feltmann had to proceed under the circumstantial evidence test of *Burdine*, and the Court analyzed her claims under the *Burdine* case. (Pt.App., pp. 7, 10-11). In order to prove

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[6] The Eighth Circuit does require direct evidence in some reduction in force cases. *Rythe*r, *supra*, 108 F.3d at 836 n.1.

her case, Feltmann had to prove pretext. Feltmann attempted to prove pretext by showing that she had been treated differently from male employees. The Court correctly observed that Feltmann had to adduce evidence of comments or conduct by the decision-maker reflective of a discriminatory attitude. (Pt.App, p. 8a). The remaining portions of the Opinion demonstrate that this statement does not mean that Feltmann had to adduce direct evidence. In discussing Feltmann's differential treatment evidence, the Court cited and relied on a number of cases in the Eighth Circuit where evidence of disparate treatment was used to prove pretext.[7] The Eighth Circuit's citation to these cases demonstrates that it reviewed Feltmann's evidence of alleged disparate treatment to determine whether she had adduced evidence of pretext.

Feltmann also claims that the Court erred in relying on *Nelson v. J.C.Penney Co.*, 75 F.3d 343 (8th Cir. 1996). Feltmann asserts that *Nelson* held that a plaintiff must adduce direct evidence of discrimination in order to make a submissible case. To the contrary, in *Nelson*, the Eighth Circuit specifically noted that in some cases, a plaintiff can make a submissible case by proving pretext. (*Id.* at 346). The Court stated, "[w]e have said that in 'some cases, evidence that an employer's proffered non-discriminatory explanation is wholly without merit or obviously contrived might serve double duty, . . . permitting an inference that . . . discrimination was a motivating factor in a plaintiff's termination. . . . '" Thus, *Nelson* does not hold that a plaintiff must adduce *direct* evidence of discrimination. Moreover, even

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[7] The Court cited three cases in its discussion of Feltmann's evidence of disparate treatment: *Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1073 (8th Cir. 1996); *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1312 (8th Cir. 1995); and *Davenport v. Riverview Gardens' Sch. Dist.*, 30 F.3d 940, 945 (8th Cir. 1994). (Pt. App. pp. 9a-10a). In all of these cases, disparate treatment evidence was considered pretext evidence. *Johnson*, *supra*, 97 F.3d at 1073; *Lidge-Myrtil*, *supra*, 49 F.3d at 1311; *Davenport*, *supra*, 30 F.3d at 945.

if *Nelson* held that a plaintiff had to adduce direct evidence, that holding would no longer be valid in light of the Court's *en banc* ruling in *Rythe*r.

C. The Resolution Of The Conflict Among The Circuits Has No Bearing On The Outcome Of This Case

Feltmann asks this Court to issue its writ of certiorari to correct the conflict in the circuits between those courts that require "pretext only" and those that require a plaintiff to meet the higher burden of "pretext plus." As set forth above, the Eighth Circuit does not require a plaintiff to adduce additional evidence of discrimination, and as a result, it cannot be characterized as a "pretext-plus" circuit. The Eighth Circuit, like the "pretext-only" circuits, holds that a plaintiff may make a submissible case by proving the elements of the *prima facie* case, along with evidence of pretext. *Rythe*r, *supra*, 108 F.3d at 837. The Eighth Circuit has only refined its analysis by noting, consistent with *Hicks*, that the evidence may not be inconsistent with a finding of discrimination.

The instant case was decided by the Eighth Circuit using the standards set forth in *Rythe*r. Thus, the Court used a standard that is for all practical purposes the lower "pretext-only" standard. The resolution of any conflict among the circuits will not affect the ultimate decision in this matter. Feltmann's request that this Court correct any conflict is no more than a request for an advisory opinion. The federal courts, including this Court, have no jurisdiction to enter advisory opinions. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439; 113 S.Ct. 2173, 2178 (1993); *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 784 (7th Cir. 1994).

D. Feltmann Failed To Make A Submissible Case Of Discrimination

Feltmann claims that the Eighth Circuit used the wrong standard of review in reviewing the evidence. Feltmann claims that the appellate court was required to assume all facts in her favor were true, resolve all conflicts in her favor, and give her the benefit of all reasonable inferences. (Petition, p. 18). The Eighth Circuit used *exactly* this standard in reviewing the evidence. The Court stated the standard as follows:

> We must consider the evidence in the light most favorable to Feltmann, assume that all conflicts were resolved in her favor, give her the benefit of all reasonable inferences, and then deny the motion for JAML if reasonable persons could differ regarding the conclusions to be drawn from that evidence.

(Pt.App., p. 7a).

Feltmann's complaint is, in reality, a complaint that the Eighth Circuit disagreed with her assertion that she had made a submissible case. This Court does not exercise its jurisdiction to review the sufficiency of evidence in such circumstances. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 125 L.Ed.2d 168, 191 (1993); *U.S. v. Johnston*, 268 U.S. 220, 227 (1925); S.Ct.R. 10.

Moreover, Feltmann failed to make a submissible case. Feltmann adduced no evidence of comments on the part of Rich or of any of the decision-makers that were indicative of gender discrimination. Feltmann's pretext evidence consisted solely of purported evidence that she was allegedly treated differently from similarly situated male sales consultants. As the Eighth Circuit held, "[t]he litany of incidents Feltmann recites, however, fails to support an inference of disparate treatment." (Pt.App., p. 9a).

Because Feltmann failed to adduce any evidence of disparate treatment, Feltmann failed to adduce any evidence of pretext and, as a result, she failed to make a submissible case. Inasmuch as this Court does not exercise its jurisdiction to review evidence, Sieben believes that a discussion of the evidence is not necessary to the ruling on the instant Petition. However, so that the record is accurate, Sieben provides the following discussion of the evidence.

Feltmann claims that she was the only sales consultant who received a memorandum regarding her work ethic. (Petition, p. 20). Rich also talked to Rick Beutel, a male consultant, about his work ethic. (T. 2:84). Feltmann adduced no evidence of any other sales consultants whose work ethic Rich questioned but did not reprimand.

Feltmann claims that she was treated differently when she was reprimanded for her use of a company demonstrator. (Petition, p. 22). However, in November, 1992, by written memorandum, Rich had instructed all sales consultants that use of the demonstrator was restricted to the St. Louis area. (App. 1:97, 1:104, 1:108; T. 2:183-84, 3:98, 3:235-38, 4:29-30, 5:93-94). Even after receiving this memorandum, Feltmann continued to make weekly, 300 mile trips to Marion, Illinois for another five months, to visit her husband. (*Id.*) The male sales consultants' use of the demonstrator was occasional at most, and took place primarily before Rich's November, 1992 memorandum. (T. 2:69-75; 2:255-57; 3:26-27).

Feltmann claims that the guest drive policy was applied differently to her. (Petition, p. 22). Feltmann was only able to specify *one* instance when Rich denied her permission to allow a customer to guest drive after the April 9 memorandum, and there was evidence that Rich denied permission to at least two male sales consultants during that period. (T. 3:259-60, 6:115-16, 6:227-28). Feltmann also claims that she was fired for failing

to log cars, while male sales consultants were not reprimanded for failing to log cars. (Petition, p. 22). However, Rich believed, and *Feltmann admitted, that by not logging cars out or asking for permission, Feltmann was attempting to hide her actions from Rich.* (T. 2:211-12, 3:231, 6:90-91). Because there was no evidence that male sales consultants had failed to log the cars in an attempt to deceive Rich, the male consultants are not similarly situated.

Feltmann cites the fact that she was reprimanded for loaning cars to two customers during a snowstorm as an example of discrimination. (Petition, p. 23). Feltmann admitted that she allowed two people, who claimed that they could not drive their own cars in the snow, to borrow cars from the new car inventory of Plaza Infiniti. (T. 2:86-89, 3:143-44). Loaning cars in this fashion was a violation of dealership policy. (T. 2:68; App. 1:107). Feltmann adduced no evidence of male consultants who lent cars in violation of the policy.

Feltmann claims that she was treated differently because Rich would not allow her to take a four-wheel drive car home during a snowstorm. (Petition, p. 23). However, the male sales consultants asked permission, but Feltmann failed to do so. (T. 2:93-94).

Feltmann claims that she was treated differently because she was placed on probation. (Petition, p. 23). However, Rich put Rick Beutel, Feltmann's male co-worker, on probation for the same reason — declining sales. (T. 2:99-100, 2:249-51)).

Feltmann complains that she was not allowed to attend the Regional Walk-Around Tournament. (Petition, p. 24). However, Rich did not allow any of the male sales consultants who wanted to participate in the tournament to attend. (T. 2:206-8).

Feltmann also claims that she was the only sales consultant who had to pay for sales brochures. (Petition, p. 24). Feltmann was the only person who expressed a desire to furnish her

customers with personal brochures and she failed to prove that male sales consultants were given free brochures.

Feltmann cites other examples of disparate treatment — the switching of a house deal with a male sales consultant, and Schlabach's refusal to approve the switching of tires on a car. (Petition, p. 25). The Eighth Circuit dealt with each of these incidents and held that Sieben had adduced a legitimate, non-discriminatory reason for each of these events, and Feltmann had failed to adduce any evidence demonstrating gender bias. (Pt.App., pp. 9a-10a).

Feltmann claimed that she was forced to swap a house deal with a male sales consultant and that, on one occasion, Rich approved a deal for a male sales consultant while he did not approve such a deal for Feltmann. (Petition, p. 25). However, as the Eighth Circuit notes, these incidents lacked any probative force given the fact that Feltmann, and no other consultant, was given forty-one clients belonging to a sales consultant who left Plaza. (T. 2:177-78, 3:210).

Feltmann also claims, in conclusory fashion, that Rich failed to get off of the phone to sign her paperwork. (Petition, p. 25). The Eighth Circuit found these allegations too vague and conclusory to support a claim of disparate treatment because Feltmann failed to cite specific incidents where this occurred.[8] (Pt.App., p. 11a).

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[8] Feltmann finds the Eighth Circuit's reliance on *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 945 (8th Cir. 1994) and *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1311-12 (8th Cir. 1995) to be misplaced. (Petition, p. 19). Feltmann claims that these cases are inapposite because they involve the grant of a motion for summary judgment. In ruling on a motion for summary judgment the court determines the same issue before the appellate court: has the plaintiff adduced sufficient evidence upon which a reasonable jury could find in favor of the plaintiff. Thus, these cases apply.

(Footnote 8 continued on next page)

Feltmann claims that the fact that she was replaced by a male sales consultant at Plaza Infiniti is indicative of sex discrimination. (Petition, p. 25). However, Rich, the manager who discharged Feltmann, hired Feltmann approximately a year and a half earlier. This evidence is compelling evidence that her discharge was for a non-discriminatory reason. *Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992).

Feltmann also cites evidence that she claims demonstrates that she was discharged for reporting problems with the incentive bonus account for the Summer Momentum program. (Petition, p. 26). Clearly, this evidence fails to establish that Feltmann was discharged because of her gender. To the contrary, if such existed, it would be inconsistent with a finding of gender bias. *See, Rythe*r, *supra*, 108 F.3d 837 n.4.

Feltmann also claims that Rich was "totally" discredited at trial because she claims that certain evidence was inconsistent with his testimony. (Petition, p. 27). Feltmann misses the point. Rich never gave conflicting reasons for Feltmann's discharge. He testified that he discharged Feltmann because she permitted customers to guest drive cars on two occasions, in direct violation of his directives, and he concluded (and Feltmann admitted), that she failed to log the cars in an attempt to deceive Rich. None of the examples cited by Feltmann cast any doubt on Rich's testimony regarding the reason for Feltmann's discharge.

E. Feltmann's Retaliation Claim

Feltmann claims that she was treated differently, and ultimately discharged, because she complained about Anzalone's

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(Footnote 8 continued)

Further, as discussed *supra*, while Feltmann had some specific incidents of *alleged* disparate treatment (i.e., the application of the guest drive policy), as the Eighth Circuit held, she adduced no evidence of specific incidents regarding her allegations that Rich refused to get off of the telephone to sign her paperwork. (Petition, p. 11a).

remark. (Petition, p. 29). As set forth above, there was no evidence that Feltmann was treated differently from similarly situated employees. The fact that Feltmann was discharged six months after the incident, standing alone, is insufficient to support a claim of retaliation. (Opinion, p. 12a) (citing *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992)). Moreover, the actions of Rich and the Capps were entirely inconsistent with retaliation. Rich was principally responsible for bringing Feltmann's complaint to management's attention. The Capps' concern in dealing with the incident suggests, if anything, that Sieben was willing to confront and rectify Feltmann's harassment claims. (*Id.*) Further, Feltmann herself admitted that the complaint was handled to her satisfaction, and that she had no further problems with Anzalone.

F. Feltmann's Wrongful Discharge Claim

Feltmann asks this Court to grant the Petition for a Writ of Certiorari for the purpose of reviewing the evidence to determine whether she made a submissible case with respect to her wrongful discharge claim. The determination of whether or not Feltmann made a submissible case under state law is not an appropriate subject for this Court's review on certiorari. *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209; 125 L.Ed.2d 168, 191 (1993), S.Ct.R. 10.

CONCLUSION

This case is not an appropriate case for review by this Court. The United States Court of Appeals for the Eighth Circuit correctly stated and applied the law. Moreover, the resolution of any conflicts among the circuit courts will have no bearing upon the outcome of this case. Therefore, Respondent Sieben, Inc., prays this Court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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